Bluebonnet Express, Inc. *and* **James Connerly.** Case 23-CA-9134

30 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 19 December 1983 Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent and the General Counsel each filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] and findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Bluebonnet Express, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. This case was heard by me on April 14 and 15, 1983, in Houston, Texas. It originated from a charge filed on November 23, 1982, by James Connerly, an individual (Connerly), against Bluebonnet Express, Inc. (Respondent).

On January 14, 1983, a complaint and notice of hearing issued alleging that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), by various acts and conduct. More particularly, the complaint alleges that in order to discourage employees from joining, supporting, or assisting a union and engaging in protected concerted activities, Respondent promulgated and enforced a rule requiring that any solicitation on company premises at any time first be cleared by Respondent's supervisor and agent Doyle Horne; that Respondent maintained and enforced this rule selectively and disparately; that Respondent interrogated Connerly about whether he had been passing out authorization cards on behalf of a union on company time or property, informed Connerly if it learned he had been passing out authorization cards on company time or property, he would be discharged; that Respondent solicited employee grievances and complaints and thereby promised employees increased benefits and improved terms and conditions of employment; that Respondent threatened its employees that it would close its doors before it would deal with a union; and that Respondent discharged Connerly and informed other employees that it had done so because of his involvement with a union.

Respondent failed to file a timely answer to the complaint as required in Section 102.20 of the Board's Rules and Regulations. Instead, Respondent filed an undated "motion to strike, or, in the alternative, for more definite statement," a copy of which was received in the Board's Houston, Texas, Regional Office on January 24, 1983. In this motion, Respondent moved to strike two paragraphs of the complaint and notice of hearing or, in the alternative, to receive a more definite statement with regard to matters contained in those paragraphs. On February 2, 1983, counsel for the General Counsel filed a response in opposition to Respondent's motion.

On February 10, 1983, Respondent filed an answer to the complaint, admitting the allegation that Respondent is a Texas corporation having facilities in Houston, Texas, where it is engaged in the business of transporting freight as a common carrier by motor vehicle. Respondent asserted that it was without knowledge or information sufficient to form a belief as to the truth of allegations regarding filing and serving of the charge; the type of business engaged in by Respondent; information regarding the dollar volume of Respondent's business which might serve to establish jurisdiction of the Board over Respondent; the status of Teamsters, General Drivers, Warehousemen and Helpers Local Union No. 968,

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[1] The Respondent has excepted to the admission into evidence of a tape recording and a transcription of a Texas Employment Commission proceeding, wherein Personnel Manager Connell testified under oath concerning the Respondent's reasons for discharging Connerly. In the circumstances presented here, we deem such receipt entirely appropriate. There is no question that under the Federal Rules of Evidence, which we are bound to follow so far as practicable (Sec. 102.39 of the Board's Rules and Regulations), Connell's testimony is substantively admissible as a vicarious admission as defined by Rule 801(d)(2)(D). The tape recording containing this testimony is a certified copy of the official record before the Commission and is self-authenticating under Rule 1005. Rule 1006 permits the use of a summary of a tape recording. In view of the Respondent's refusal to make Connell available during the unfair labor practice proceeding and Connell's extensive involvement in the events at issue, the receipt of Connell's testimony was proper. Cf. *Lattimer Associates*, 258 NLRB 1012 (1981), where the respondent did not refuse to make available a witness.

In Member Hunter's view, as the testimony on the tape is relevant and an admission against interest given under oath at a formal administrative proceeding, he would find receipt of the tape proper, irrespective of Connell's failure to testify during the unfair labor practice proceeding.

[2] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] After the administrative law judge issued his Decision and Order recommended in this case, the Board issued *Our Way, Inc.*, 268 NLRB 394 (1983), wherein it overruled the holding of *T.R.W. Bearings*, 257 NLRB 442 (1981), that rules prohibiting employees from soliciting during "working time" are, together with rules prohibiting soliciting during "working hours" presumptively invalid. Accordingly, we disagree with the judge's conclusion, made in reliance on *T.R.W. Bearings*, that the Respondent's no-solicitation rule was invalid for overbreadth. We nevertheless agree with the judge that the Respondent violated Sec. 8(a)(1) by discriminatorily establishing its no-solicitation rule and likewise violated Sec. 8(a)(3) and (1) by discriminatorily enforcing that rule against Connerly. Member Zimmerman, for the reasons stated in his dissent in *Our Way*, would adhere to *T.R.W. Bearings* and find the rule invalid as well.

affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as a labor organization within the meaning of the Act; and the status of certain named individuals as supervisors and agents of Respondent, including General Manager Doyle Horn, Operational Manager Bob Martin, Director of Personnel and Safety Robert H. Connell, and Terminal Manager Herb Walton. Respondent denied all substantive portions of the complaint wherein any unfair labor practice was alleged.

By order dated March 3, 1983, Respondent's motion to strike was denied.

On March 10, 1983, counsel for the General Counsel filed a "motion to strike portions of Respondent's answer." This motion sought to strike those portions of Respondent's answer wherein Respondent asserted itself to be without sufficient knowledge to form a belief regarding those matters described more fully above. On March 16, 1983, an order to show cause issued requiring Respondent to show cause why this motion should not be granted. In response thereto, Respondent filed an undated opposition to General Counsel's motion to strike and renewed motion to strike portions of General Counsel's complaint. In conjunction therewith, Respondent filed an amended answer to the complaint, reasserting that it was without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the filing and serving of the charge,[1] the status of Teamsters Local Union 968 as a labor organization within the meaning of the Act, and whether Respondent maintained a rule providing "any solicitation on company premises at any time must be first cleared by Respondent's supervisor and agent Doyle Horn." Respondent amended its prior answer by admitting allegations regarding its business, and its volume of business; the fact that Horn, Martin, Connell, and Walton occupy the positions mentioned above and the fact that such individuals are supervisors within the meaning of the Act; and admitting that one Gwen Gilmore is employed by Respondent as a personnel clerk. On March 30, 1983, counsel for the General Counsel filed a response to Respondent's opposition and renewed motion to strike. By order dated April 1, 1983, both the General Counsel's motion to strike and Respondent's renewed motion to strike were denied.

At the trial herein, all parties were represented and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the trial, both Respondent and counsel for the General Counsel filed timely briefs with me which have been duly considered.

On the entire record in this case, and from my observation of the witnesses, I make the following

[1] The formal papers, received in evidence without objection from Respondent, show that the charge was filed on November 23, 1982, and served on Respondent by certified mail on November 24, 1982.

FINDINGS OF FACT

I. JURISDICTION

Bluebonnet Express, Inc. is, and has been at all times material herein, a Texas corporation with facilities located on Little York and Igloo Streets in Houston, Texas, where it is engaged in transporting freight as a common carrier by motor vehicle. During the past 12 months, Respondent has interlined freight in Texas which had its origin outside Texas and, for interlining such freight with other trucklines to and from points outside the State of Texas, Respondent has received in excess of $50,000.

Based on the above, I conclude that Respondent has functioned as an essential link in the transportation of freight and commodities in interstate commerce and that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

Teamsters, General Drivers, Warehousemen and Helpers Local Union No. 968, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is an organization which serves to represent employees in dealing with employers for the purpose of negotiating wages, hours, and working conditions. It is party to collective-bargaining agreements with numerous employers. Accordingly, Teamsters, General Drivers, Warehousemen and Helpers Local Union No. 968, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

As previously indicated, Respondent operates facilities on Little York and on Igloo Streets in Houston, Texas. Respondent's headquarters are located at the Little York terminal, while the Igloo Street terminal, a smaller facility, primarily serves airport traffic. General Manager Doyle Horne, Operations Manager Bob Martin, and Director of Personnel and Safety Robert H. Connell are all stationed at the Little York facility. Connell is the immediate supervisor of drivers at that facility. Herb Walton is terminal manager at the Igloo Street facility. Walton assumed that position in midsummer 1982 when the previous terminal manager left. At that time, Walton assumed the duties of terminal manager as well as continued to perform his prior duties as director of sales.

Walton's sales duties require his frequent absence from the airport terminal, during which he calls on existing and prospective customers. During Walton's absence, Lillian Goodrum performs various duties for, and on behalf of, Walton. Goodrum's status as a supervisor within the meaning of the Act is discussed further below.

James Connerly began working for Respondent on January 29, 1982, as a truckdriver. When he first started, Connerly was assigned to the Little York facility. He was transferred to the Igloo Street facility, commonly re-

ferred to as the airport terminal, in April or May 1982. Connerly continued to work at the airport terminal until his discharge on September 22, 1982.

B. *Connerly's Union Activity*

Connerly first contacted the Union in late August 1982. After obtaining authorization cards from the Union, Connerly distributed them to Respondent's employees. In early September, Connerly met with six employees at Respondent's Little York facility. Several of those employees signed authorization cards. On the following day, Connerly broached the subject of the Union with Terry Bragg, an employee at the airport terminal, as he was giving Bragg a ride home after work. Later that same evening, Connerly gave an authorization card to another employee of the Little York facility in the parking lot, and Connerly solicited him to join the Union as well. Connerly also solicited other employees to join the Union and gave them union authorization cards.

About the same time that Connerly solicited various other employees to sign union authorization cards, he solicited truckdriver Frank Garcia, who worked at Respondent's airport terminal. Connerly testified that he first solicited Garcia to sign an authorization card while Connerly was at work and Garcia was coming in to begin work. Connerly was in Respondent's airport terminal office talking to Goodrum when he saw Garcia outside on his way into work. According to Connerly, Garcia returned a signed authorization card to him the following day as Garcia was again arriving at work. Garcia's testimony is different from Connerly's. According to Garcia, Garcia was at the American Airlines terminal at the airport when Connerly approached him about signing a card. Garcia was working; Connerly was not. According to Garcia, he was in the process of having one of Respondent's trucks loaded by American Airlines employees when Connerly approached. According to Garcia, it was then that Connerly asked him if he wanted to sign a union card. I credit Garcia for two reasons. First, I think it is more likely that an employee who was solicited individually would be more likely to remember the specific circumstances than would an individual who solicited many different employees over a period of several days. Second, I note that in a hearing before the Texas Employment Commission regarding Connerly's claim for unemployment compensation, Connerly testified that he did all his soliciting in front of a Stop & Go food store. I take this as evidence of the fact that Connerly's memory is less reliable than Garcia's.

C. *Respondent's Investigation and Subsequent Discharge of Connerly*

In mid-September, Respondent learned, apparently from one of its secretaries, that employees were being solicited to join the Union. On September 20, 1982, Respondent's president Doyle Horne, Director of Operations Robert Martin, and Director of Personnel and Safety Robert H. Connell conducted an interview with Garcia about his being solicited to sign a union authorization card. Although both Horne and Martin testified herein, they provided little testimony about this interview. Their testimony regarding conversations with Garcia relate almost exclusively to events on September 21, when they met again with Garcia to take a written statement from him. Garcia, on the other hand, testified in some detail regarding the September 20 interview, and I credit his testimony. Garcia testified that this discussion between him, Horne, Martin, and Connell took place in Connell's office. According to Garcia, Connell asked him "if I knew anything about the Union cards and anybody that was trying to get in the Union." Garcia responded, "Yes." Prior to that, Garcia had never mentioned to anyone with Respondent the fact that Connerly had approached him about signing a union authorization card. Garcia then proceeded to tell Connell the circumstances under which he had been approached by Connerly. After Garcia had done so, Connell told Garcia he was going to bring in a lawyer and asked Garcia if he were willing to make a statement to the same effect as what he had told Connell. Garcia said he was.

On the morning of September 21, Horne, Martin, and Connell held a meeting with Connerly in Martin's office. When Connerly arrived at Respondent's main facility, he was told that Horne wanted to see him. Connerly did not immediately seek out Horne. Instead, he looked for and found Connell, and asked him if Connell knew why Horne wanted to see him. Connell took Connerly to find Horne, who was in Martin's office. Connerly testified, "Horne asked me if I was passing out union cards on company time and property, and I told him no I wasn't. Horne told me if he thought I was, he would fire my ass on the spot." Connerly testified that Connell then told him another truckdriver had come up to Connell and said that Connerly had approached him on company time to sign a union card. Connerly asked Connell the name of this driver, and Connell refused to tell him the name. Connerly testified that Martin then stated Bluebonnet was not union, would not be union, and would shut their doors before they went union. According to Connerly, Horne then asked him if he had any complaints about the job. Martin asked Connerly if he knew Respondent's policy about unions. Connerly replied that when he was hired he was told by Phil Ley, who interviewed and hired him, that Respondent was not a union company and would not be one. Martin then told Connerly they would check into the matter further and let Connerly know what they decided. According to Connerly, this meeting lasted approximately an hour to an hour and a half.

Horne admits part of Connerly's testimony and denies part. Horne admits, "The purpose of the meeting was to ask [Connerly] if he had solicited other employees to sign union cards while he was on company time, or either while they were on company time." Horne testified, "I asked Connerly if he had engaged in such activities, and he denied it, and then he gave us about a 10 minute recitation of what he thought of unions. He didn't like unions . . . ." Later Horne testified that the question he asked Connerly was whether Connerly had been soliciting other employees on "company working time." Horne admitted that after he questioned Connerly

about soliciting other employees, both Martin and Connell also questioned Connerly about this subject.

Horne denied stating that if he thought Connerly was passing out union cards on company time, he would fire Connerly and denied soliciting grievances from Connerly. Horne also denied that Martin stated Bluebonnet would not be union and would close the doors before doing so.

Martin too admits part and denies part of Connerly's testimony. According to Martin, the meeting with Connerly was "basically just to ask [Connerly] if he had been involved in solicitation on company time." According to Martin, Connerly denied doing so and began discussing problems he had encountered with unions when working for a previous employer. Martin denies telling Connerly that Bluebonnet would close its doors before it would become union and denies threatening Connerly in any way. Martin too denies that Horne stated if he thought Connerly was soliciting union cards, Horne would fire Connerly on the spot. Martin denies that any time during this conversation Connerly was asked if he knew Respondent's policy on unions. Martin denies Connerly stated that Ley had told him about Respondent's policy regarding unions when Connerly was hired. Martin denies that Connerly was asked if he had any complaints about his work.

Connerly denies that he brought up his experience with unions at a previous employer in order to persuade Horne, Martin, and Connell that there was no substance to the claim that he had been soliciting authorization cards on behalf of the Union.

Based on their demeanor, I am convinced that Connerly, Horne, and Martin are all telling only partial truths. All struck me as admitting that which they thought least prejudicial to their position and denying everything else. I conclude that whenever one of them testified that something was done or said in this meeting between Horne, Martin, Connell, and Connerly, it in fact occurred, and whenever one of them denied the testimony of another, their denial is to be rejected. What occurred in that meeting is this: Horne asked Connerly if he had been passing out union cards on company time and property. Connerly denied doing so. Horne told Connerly if he thought Connerly had been doing so, Horne would fire Connerly on the spot. Connell stated that Respondent learned from another driver Connerly had been soliciting other employees on company time to sign union cards. Connell refused to reveal the identity of this driver. Martin then told Connerly that Respondent was not union, would not be union, and would shut their doors first. Martin asked Connerly if he knew Respondent's policy about unions. Connerly reiterated what he had been told by Ley when he was hired. Horne asked Connerly if he had any complaints. In order to try to convince Horne, Martin, and Connell that he was not involved with the union, Connerly went on at some length about problems he encountered as a result of a union while working for a previous employer. The meeting ended by Martin stating Respondent would check into the matter further and let Connerly know what they decided.

After the meeting between Horne, Martin, Connell, and Connerly, Connerly went back to work at the airport terminal. He did not stay at work all day however. About 1 p.m., Connerly told Goodrum he was sick and was leaving work to see a doctor. Connerly testified he had hurt his back moving a piece of furniture sometime prior to this day, and he was in pain from this injury. According to Connerly, he saw the doctor on the afternoon of September 21, and medication was prescribed. According to Connerly, the doctor also told him that because of the type of work he did, driving trucks, Connerly should remain off work for a few days.

On September 21, after the meeting between Horne, Martin, Connell, and Connerly, Respondent conducted a second interview with Garcia. Present during this interview were Horne and Respondent's counsel herein. At the beginning of this interview, Horne informed Garcia that the purpose for a second meeting was "to either substantiate or disprove what Connerly had stated about soliciting." After talking to Garcia, Respondent's counsel prepared a statement describing the circumstances under which Connerly approached him about signing an authorization card on behalf of the Union, which Respondent's counsel asked Garcia to sign. According to Garcia, Respondent's counsel did not specifically tell him that he had a choice whether or not to give or to sign the statement, and counsel did not specifically tell Garcia that he would not be rewarded in any way for giving the statement. Garcia testified that Respondent's counsel, however, did tell Garcia that he was free to leave at any time during the course of the interview and that if Garcia did not give a statement, he would not be hurt in his employment in any way. As Garcia put it, when he gave the statement he was under the impression "I would give it if I wanted to. If not, I wouldn't." Although some of the words and expressions contained in this statement are clearly slanted in Respondent's favor, the statement taken as a whole is a factual recitation consistent with Garcia's testimony herein of the circumstances under which Connerly solicited him to sign an authorization card on behalf of the Union.

On the morning of September 22, according to Connerly, he returned to the doctor he had visited on the previous afternoon in order to have the heat packs applied to his back to reduce pain he was suffering. While Connerly was at the doctor's office, Connell telephoned Connerly's father-in-law's house in search of Connerly. Up until the preceding weekend, Connerly and his wife had lived with Connerly's father-in-law. As soon as Connerly had finished his vist to the doctor, Connerly returned to his father-in-law's house, according to Connerly, to pick up any mail that might have been delivered there addressed to him. About 5 minutes after Connerly arrived, Connell telephoned again and, on this occasion, spoke to Connerly. According to Connerly's uncontradicted testimony, Connell told Connerly that Respondent had a signed affidavit from a truckdriver saying that Connerly approached him about signing a union authorization card while the truckdriver was on company time. Connell then stated that Connerly "was here and now terminated." Connerly again asked who this truckdriver

was, and Connell refused to disclose the truckdriver's name. Connell then said he was not going to talk about it anymore, and hung up the telephone.[2]

Following Connerly's discharge, on or about September 28, Connerly's wife telephoned Respondent's facility and spoke to personnel clerk Gwen Gilmore. On behalf of her husband, Ms. Connerly asked Gilmore that a copy of Connerly's termination papers be sent to them. Gilmore told Ms. Connerly that Connerly would have to send a letter requesting a copy of the papers before they could be sent to him. As a result, Ms. Connerly prepared a letter for her husband, which he signed and she mailed approximately October 2. Connerly received no response to his request for a copy of his termination papers. Thereafter, Connerly himself telephoned Respondent's facility and spoke to Connell. Connerly told Connell he wanted to see his personnel file and have a copy of his termination papers. According to Connerly's undisputed testimony, Connell told Connerly that such papers were company property and Connerly had no right to see them. Thereafter, on November 17 or 18, Ms. Connerly telephoned Respondent and asked to speak to someone in the personnel department. Her call was transferred to Gilmore. Ms. Connerly then assumed a false identity, pretending to be an employer with whom Connerly had applied for work. Ms. Connerly told Gilmore that on his job application, Connerly stated he was fired by Respondent for union activities on the job. Gilmore responded, "Yes, he was fired for union activity" and said that was the reason stated on his termination papers.[3] Ms. Connerly then asked Gilmore a second time if Connerly was fired for union activities on the job. According to Ms. Connerly, Gilmore replied, "Yes." Gilmore then added that Connerly was a good and hard worker.

Willie Lee Jones, who began working for Respondent in April 1982, was laid off in November 1982, and had not worked for Respondent between then and the time of the trial herein, testified that at some point in time shortly after Connerly's discharge, he, employee Terry Bragg, and Terminal Manager Walton had a brief conversation in which Connerly's discharge was discussed. According to Jones, in this conversation Walton stated to him and Bragg that Connerly had been fired for union activities. Jones added, "He said James [Connerly] wanted a union job . . . . He said James was terminated for union activities." According to Jones, "union activities" were the actual words used by Walton. Both Walton and Bragg denied that Walton ever made such a statement. Bragg, like Walton, was called as a witness by Respondent. During Jones' testimony, I was very impressed by his demeanor and found him to be a credible witness. On cross-examination, Jones' direct testimony was contradicted in several respects, but Jones made no effort to hide his errors and candidly admitted them. His demeanor was impressive. Bragg, on the other hand, struck me as a thoroughly biased witness, and my initial reaction would be to conclude from his denial alone that the conversation indeed took place as testified to by Jones. The opposite, however, is true of Walton who, like Jones, was extremely candid. He struck me as a person who took the oath before testifying seriously and whose only purpose in testifying was to tell the truth. I find no basis for discrediting Walton. Bearing these facts in mind, and noting particularly Walton's sterling demeanor and certain significant errors in Garcia's testimony which were corrected only on cross-examination, I have decided to credit Walton with regard to this conversation, and I conclude that counsel for the General Counsel has failed to carry its burden of proof that the conversation took place as alleged.

Jones also testified to a conversation which he had sometime in October 1982, after Connerly's discharge, with Supervisor Richard Bell in the dispatch office at Respondent's Little York facility. According to Jones, during this conversation Bell accused Jones of wanting "to do things Santa Fe's way, the Union way." Jones then corrected himself, "The Southern Pacific way." According to Jones, Bell knew that he had previously worked at Southern Pacific in a job where he was a member of a union. According to Jones, a second conversation occurred between him and Bell about 2 weeks later in the same office. According to Jones, Bell and another dispatcher were in the office with him when Jones and Bell had a minor argument about how something should be done. During this disagreement, Bell said to Jones that he should be working on a union job. Bell did not testify, and Jones' testimony is uncontradicted. Counsel for the General Counsel argues in her brief that although there is no allegation in the complaint directed toward these conversations between Jones and Bell, the substance of the conversations was fully litigated, and they convey a message that support for a union and continued employment by Respondent were incompatible. She urges that violation of Section 8(a)(1) of the Act be found with regard to these conversations. I decline to make such a finding. Not only does the complaint fail to address these conversations, but counsel for the General Counsel made no attempt to amend the complaint herein at trial with regard to them and has otherwise failed to put Respondent on notice she is seeking to have a substantive finding of a violation made with regard to them. Bell did not testify and I cannot conclude that the substance of these conversations was fully litigated to warrant finding a violation of the Act with regard to them. I shall, however, consider these conversations as evidence of Respondent's animus toward employee union activities, for it is not necessary to specifically allege such matters in the complaint. There is no evidence that Bell was unavailable to Respondent, and Respondent made no request for a postponement or continuance in order to secure Bell's testimony. Accordingly, I conclude that the

[2] In his later testimony, Connerly asserted that during this conversation with Connell, Connerly informed Connell that he had seen a doctor and had been told to stay out of work for a few days. I do not credit Connerly in this regard. I believe Connerly made this up, thinking it would somehow bolster his case, and that in fact the only person that Connerly told he was going to be off work was Goodrum. Since Goodrum's status as a supervisor is in dispute, Connerly apparently felt the need to establish that he had informed someone else in management of his absence.

[3] In fact, Respondent's termination slip states as the reason for Connerly's discharge: "Lied about contacting employees on company time about private matter. Interfered with employees production." Gilmore, however, did not testify.

substance of these conversations may appropriately be considered as evidence of Respondent's animus toward employee union activities.

Analysis and Conclusions

Testifying to the reasons Respondent discharged Connerly were Respondent's president Horne and Operations Manager Martin. Horne testified that Connerly was discharged for three reasons. First, in soliciting Garcia to sign a union authorization card, Connerly was interfering with an employee on company time. Second, Connerly lied to Respondent in the meeting which Horne, Martin, and Connell held with Connerly on September 21 when Connerly denied soliciting employees on company time. Third, Connerly lied to Respondent on September 22 about being sick.

According to Horne, Connell and Martin participated in the decision to discharge Connerly. Martin, however, specifically testified as follows on cross-examination:

> Q. (By Ms. Gant) Did you participate in the decision to discharge Connerly?
> A. (By Martin) No ma'am.

According to Horne, Respondent maintained a rule prohibiting employees from soliciting other employees for any cause or purpose "on company time." Horne testified, "the rule about solicitation is the employee cannot solicit while he is on company time, nor can he solicit another employee while they are on company time." Horne admits that the rule is not in writing, but asserts that employees have been informed of it orally when they are first hired and reminded of it in regular safety meetings. According to Horne, "company time" is "when an employee is getting paid for the hours he is supposed to be working." Horne testified that neither lunch nor breaks are included in that time. Horne also testified, however, that whether employees clock out for breaks depends on their job classification. Horne admitted that truckdrivers take breaks at their own discretion as time permits because "they know what their work load is." A truckdriver may or may not clock out for breaks, depending on where he is at the time. Horne then admitted that there is no written rule requiring truckdrivers to clock out for breaks and that in fact while hourly employees clock out for lunch, they do not do so for breaks.

Martin, like Horne, testified that Respondent maintains a no-solicitation rule. According to Martin, "Bluebonnet has a policy against employees soliciting other employees while either is on company time." Martin testified that he was present in safety meetings held by Connell with employees in which Connell discussed the no-solicitation policy with employees. Respondent did not produce Connell to substantiate this testimony, and this fact is discussed more fully below.

Connerly and employee Jones both testified that neither had ever been told that Respondent maintained any kind of no-solicitation rule. Employee Frank Garcia, called as a witness by Respondent, also testified that he had never heard of such a rule from any of Respondent's supervisors. Employee Terry Bragg, however, testified that such a rule did exist. According to Bragg, the rule was "as long as you was on company time, no soliciting or anything." Bragg asserted that he had been told about this rule both when he was hired and later at truckdrivers' safety meetings. Bragg's testimony is totally unworthy of belief. On cross-examination, Bragg was shown, and read from, an affidavit signed by him which states:

> I have never seen any company rule except on the bulletin board on the dispatch office and the time clock at the Little York office; then just on use of alcohol and drugs on company time, and they don't say anything about selling things or distributing information about them on company time or premises. I never heard anyone in management discuss at the company meetings or anything about a limit on distribution information or selling things on a company time or premises. I have never heard of any rule governing this question from any source.

Bragg then admitted that this was a true statement. Bragg testified he saw no discrepancy between the statement in his affidavit, and his testimony on examination. The difference, according to Bragg, is that "solicitation" means something different from "selling things." According to Bragg, the difference is that solicitation "could be passing out anything, literature on credit card applications or something like that." The problem with Bragg's explanation is this. Assuming he is correct, as indeed he is, that "solicitation" and "selling things" are not interchangable, it is the former which has the broader definition and the latter which has the narrower definition. Therefore, if Bragg was indeed aware of a rule that "as long as you was on company time, no soliciting or anything" he could not have truthfully made the statements contained in his affidavit. Moreover, Bragg's affidavit does not refer only to rules prohibiting employees from "selling things." Rather, Bragg specifically stated he had never seen or heard of any rule prohibiting employees from "distributing information." Bragg's failure to adequately explain the discrepancies between his testimony and his signed affidavit, as well as his general demeanor, leads me to reject his testimony.

Other facts in this record point strongly to the conclusion that until Respondent learned of Connerly's union activity, it had no rule prohibiting employees from soliciting one another for almost any reason or cause. Raffle tickets, chances on sports pools, and Girl Scout cookies were regularly peddled on Respondent's premises on working time. Walton himself encouraged such activities by making purchases of various items offered. Walton candidly admitted he had no objection to employees at the airport terminal purchasing such items during working time and further stated that he saw nothing wrong with an employee offering cookies for sale to another employee who was "engaged in supervising the loading of a truck," which is what Garcia was doing when Connerly approached him. Truckdriver Willie Jones testified that he purchased slots in a football pool from one of Respondent's secretaries on working time at Respondent's main terminal on Little York. Jones also testified he saw raffle tickets being sold on Respondent's airport ter-

minal premises on at least two occasions. On one such occasion, both Goodrum and Walton purchased tickets, and the other occasion Goodrum did so.[4] Respondent's president Horne attempted to explain all of this evidence by simply observing that Respondent maintained no policy prohibiting football and other sports pools on Respondent's premises.

There is yet another piece of evidence that prior to Connerly's union activity, Respondent never maintained a rule prohibiting employee solicitation. Prior to the trial, counsel for the General Counsel served a subpoena ad testificandum on Robert Connell at Respondent's premises. At the commencement of the trial herein on April 14, Respondent's counsel refused to make Connell available, although Respondent had admitted in its amended answer he is a supervisor and agent of Respondent. The subpoena had been issued on April 7, and the return receipt reflects that it was served on Respondent on April 9. Respondent, through counsel, asserted that the subpoena had been served within the 5-day period preceding the commencement of the trial, that Respondent was considering whether to file a motion to quash the subpoena, and that until the 5 days had expired within which Respondent had the right to file such a motion,[5] Respondent was not going to produce Connell as a witness. Respondent, through counsel, stated:

> We don't intend to produce him at this time, your honor. It is possible that during the hearing, we might want to call him as our own witness, but we haven't made the determination yet.

Respondent never called Connell, although the testimony of Horne and Martin described above shows that he is the one who made the decision to discharge Connerly. Though Respondent refused to produce him in his trial, Connell testified before the Texas Employment Commission regarding Connerly's claim for unemployment compensation. I admitted into evidence a tape of that hearing which constitutes the official transcript. During that hearing, Connell testified that Respondent maintains a rule which requires "that any solicitation for any organization or purpose must be cleared through the general manager of the company," and that Connerly was discharged for lying about not violating this rule. Connell's testimony about the rule itself is sharply different from Horne's and Martin's before me.[6] Connell then testified that when Connerly was hired, he signed a statement acknowledging a list of rules which specifically included this no-solicitation rule. Connell, however, did not have a copy of those rules with him at the hearing. That hearing was held on December 7, 1982. The trial herein commenced on April 14, 1983. In the ensuing months, Respondent was apparently unable to produce this rule which Connell specifically testified existed. Accordingly, at the trial herein Horne testified that the rule was not a written rule but was an oral rule conveyed to employees when they were hired and in safety meetings. One wonders if this discrepancy between their testimony, as well as other discrepancies noted later, are the reasons why Respondent refused to make Connell available as a witness.

Based on all the above, I find that prior to Respondent learning of Connerly being engaged in union activity, it maintained no rule prohibiting employees from soliciting other employees, whether working or not. Horne and Martin claimed such a rule existed, but that it was oral and not written. Connell, however, testified before the Texas Employment Commission to a much different rule which he claimed was in writing. The conflict between their testimony is significant. Bragg testified that such a rule existed, but his testimony is in direct conflict with his affidavit. The record reflects very clearly that in fact prior to the advent of union activity employees solicited one another on the job and during working time for a multitude of causes. Walton himself candidly admitted that he saw nothing wrong with an employee soliciting another employee while the latter was supposedly "supervising the loading of a truck." All of these facts have been taken into consideration, and all point to the conclusion I have drawn that prior to union activity by Connerly, Respondent in fact never maintained any no-solicitation rule. It was only when Respondent learned that Connerly was soliciting employees' signatures on union authorization cards that Respondent hastily established this "rule" to avert the threat of unionization. Discriminatory establishment or enforcement, even of a no-solicitation rule which is valid on its face, violates Section 8(a)(1) of the Act. See, e.g., *Hanes Hosiery*, 219 NLRB 338, 350 (1975). Moreover, even if I were to find that prior to the advent of union activity Respondent maintained some form of a no-solicitation rule, it is clear from the testimony of Horne and Martin on the one hand, Bragg on another, and Connell's testimony before the Texas Employment Commission on yet a third, that whatever rule Respondent maintained was so overly broad as to itself violate Section 8(a)(1) of the Act. *T.R.W. Bearings*, 257 NLRB 442 (1981). With regard to Connell's testimony before the Texas Employment Com-

[4] Inordinate time was spent by both parties developing testimony to prove that Goodrum was, or was not, a supervisor within the meaning of the Act. The relevance of this issue is Respondent's tolerance of numerous kinds of solicitation prior to Connerly's union activity. In view of Walton's candid testimony described above I find the significance of Goodrum's status too pale. To the extent Goodrum's status continues to have significance, however, I note that while Respondent's witnesses, including Walton, testified that Goodrum was not a supervisor, Walton also candidly admitted that in his absence from the airport terminal, which is frequent, Goodrum responsibly and independently directs the work of truckdrivers. Uncontroverted evidence also shows that Goodrum independently authorized truckdrivers to take time off work or to leave work early. Accordingly, I find that although her supervisory duties may have been only part time, Goodrum was nevertheless a supervisor and agent of Respondent within the meaning of the Act.

[5] See Sec. 102.31(b) of the Board's Rules and Regulations.

[6] When questioned about how Connerly's alleged violation of this rule came to Respondent's attention, Connell testified:

> Another driver brought the issue up and he was questioned and investigated. We decided, the Company decided to question some of the drivers and make its position known to them on the particular matter and Mr. Connerly's name was put forward as the individual doing the solictation on behalf of labor organizations.

I find Connell's statement, "The Company decided to question some of the drivers and make its position known to them on the particular matter," consistent with Garcia's testimony before me about what happened at the meeting on September 20, and I have taken that into account in crediting Garcia.

mission that the rule required "any solicitation for any organization or purpose must be cleared through the general manager of the company," see *Lummus Industries*, 254 NLRB 649, 653 (1981), enfd. 679 F.2d 229 (11th Cir. 1982). When an employee is discharged pursuant to a rule which is overly broad, it is no defense simply to demonstrate that the employee in fact solicited another employee during working time. *J. L. Hudson Co.*, 198 NLRB 172 (1972). The discharge is nevertheless unlawful unless the employer can demonstrate that the solicitation interfered with either the employee's own work or that of other employees and, further, that the reason for the discharge was such interference, and not the rule violation. *Miller's Discount Stores*, 198 NLRB 281 (1972). In this case, Garcia's alleged "supervising of a loading of a truck" amounted to no more than standing by while employees of another employer loaded the truck. Garcia's own responsibility did not actually begin until the other employees' duties had ended, and then amounted only to seeing to it that the load had been adequately and properly secured. It is evident that Connerly's solicitation of Garcia while Garcia was simply standing by did not interfere with his work. This conclusion is also mandated by Walton's candid testimony that he saw nothing wrong with an employee soliciting another employee while the latter was supposedly "supervising the loading of a truck." Moreover, Respondent's disparate establishment and enforcement of its supposed rule itself indicates that the reason for Connerly's discharge was not because he interfered with another employee, but rather because of the technical violation of a hastily concocted rule designed for the specific purpose of thwarting Connerly's union activity among other employees.

Horne asserted that violation of its no-solicitation rule was not something for which an employee would normally be discharged. He claimed that the purpose for interrogating Connerly about violating the supposed "rule" was only to warn Connerly against such activity, and that it was only when Connerly lied to Respondent on two separate occasions that Respondent decided to discharge Connerly. I find Horne's testimony incredible. Horne himself testified that after interrogating Garcia the first time about being solicited for the Union by Connerly, the first thing Horne did was to call Respondent's counsel. Calling counsel appears rather extreme if Horne's purpose was only to warn Connerly against soliciting, but such action is consistent with seeking advice on the limits to which Respondent might go, hence suggesting that Horne's purpose was actually to discharge Connerly. Moreover, a less than honest response to unlawful interrogation, such as that conducted by Horne with Connerly on September 21, cannot be used to legitimate Connerly's discharge.

Last, Horne asserts that it was actually two lies perpetrated by Connerly which caused Respondent to discharge him. Horne testified that on the morning of September 22, after Respondent had secured a written statement from Garcia, Respondent telephoned Connerly in order to give him yet another chance to explain the discrepancy between Connerly's version and Garcia's version of the solicitation Horne testified: "He didn't lie to me directly. It was indirectly the next day . . . [Mr. Connell], who is our director of safety and personnel, called out at the airport terminal where Mr. Connerly works, and Mr. Connerly had called in that morning being sick. And so [Mr. Connell] then tried to reach him at home over the telephone . . . and I believe it was [Connerly's] wife said, he is over helping his father-in-law move. He wasn't sick. So that is two occasions that he lied to us, and, you know, you can't tolerate someone that lies."

I reject altogether Horne's testimony that Connell was told by Connerly's wife Connerly was helping his father-in-law move and was not sick. Such testimony is the rankest type of hearsay evidence, and I will not accept it where, as here, Respondent purposely refused to make Connell available as a witness. An adverse inference is clearly warranted here that if Respondent had produced Connell as a witness, he would not have corroborated Horne's testimony. *Chromalloy Mining*, 238 NLRB 688, 696 (1978); *Trinity Memorial Hospital*, 238 NLRB 809, 812 (1978). There is, however, still greater reason to reject Horne's rank and hearsay testimony. At the hearing before the Texas Employment Commission, Connell specifically testified in response to a question from the hearing officer:

> [By Hearing Officer.] All right. Did his separation have anything to do with his absence at that point or his injury?
>
> [Connell] No. We weren't even aware that he was injured.

This direct conflict in testimony given by Horne in his trial and by Connell in an earlier administrative hearing before another forum undercuts not only Horne's credibility but Respondent's entire position in this case. It is no small wonder that Respondent's counsel refused to produce Connell in response to the General Counsel's subpoena and made no attempt to call him as a witness on its own behalf. I wholly reject Respondent's claim that Connerly's alleged second lie had anything whatever to do with Connerly's discharge. I find it to be a half-hearted attempt, manufactured after the fact to justify Respondent's unlawful discharge of Connerly for having engaged in union activity. The alleged lie, as well as Horne's claim that it had anything to do with Connerly's discharge, is pure fabrication. Rather, having learned that one of its employees was engaged in union activity, Respondent immediately created a no-solicitation rule, interrogated employees, including Garcia, in order to determine who it was that was engaged in union activity; interrogated Connerly, and subsequently discharged Connerly when it was able to secure a written statement from Garcia upon which Respondent could base a colorable argument that Connerly had violated its hastily concocted rule. I find that Respondent discharged Connerly in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent Bluebonnet Express, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters, General Drivers, Warehousemen and Helpers Local Union No. 968, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. About September 21, 1982, Respondent promulgated and enforced a rule prohibiting employees from soliciting other employees to sign authorization cards or otherwise support a union "on company time." Respondent promulgated this rule only after learning that one of its employees was engaged in union activity and applied this rule both selectively and disparately to thwart employee union activity contrary to a longstanding practice of employees being permitted to engage in nonunion-related solicitations and distributions. Respondent thereby violated Section 8(a)(1) of the Act.

4. About September 21, 1982, Respondent interrogated employee James Connerly about alleged violations of the rule referred to in the preceding paragraph; informed Connerly that if Respondent learned Connerly had been passing out union authorization cards on company time, Connerly would be immediately discharged; solicited complaints and grievances from Connerly, thereby impliedly promising improved terms and conditions of employment in order to discourage Connerly from further union activity; and threatened Connerly that Respondent would close its doors before allowing employees to be represented by a union; thereby violating Section 8(a)(1) of the Act.

5. About September 20 and 21, 1982, Respondent, through its own officers and through its counsel, interrogated employee Frank Garcia about alleged violations of the rule referred to in paragraph 3 above, and Respondent thereby violated Section 8(a)(1) of the Act.[7]

6. About September 22, 1982, Respondent discharged employee James Connerly pursuant to the rule referred to in paragraph 3 above because of Connerly's union activity and in order to discourage Connerly and other employees from engaging in activity on behalf of the Union, and Respondent thereby violated Section 8(a)(1) and (3) of the Act.

7. The unfair labor practices which Respondent has been found to have engaged in, as described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Bluebonnet Express, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating or enforcing a rule prohibiting employees from soliciting other employees to sign authorization cards or otherwise support a union on company time and from applying such a rule selectively or disparately to thwart employee union activity contrary to its longstanding practice of employees being permitted to engage in nonunion-related solicitations and distributions.

(b) Interrogating employees about alleged violations of the rule referred to in the preceding paragraph.

(c) Informing employees that if Respondent learned that they have been passing out union authorization cards on company time they would be immediately discharged.

(d) Soliciting complaints and grievances from employees, thereby impliedly promising improved terms and conditions of employment, in order to discourage employees from further union activity.

(e) Threatening employees that Respondent would close its doors before allowing employees to be represented by a union.

(f) Discharging employees pursuant to the rule referred to in subparagraph (a) above because of those employees' union activities and in order to discourage employees from engaging in activity on behalf of the Union.

(g) In any other like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Offer James Connerly immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges.

(b) Make whole James Connerly for any loss of earnings or benefits he may have suffered by reason of the discrimination against him by payments to him of a sum of money equal to the amount he normally would have earned from the date of said discrimination to the date of Respondent's offer of reinstatement, less net interim earnings, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977); see generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

(c) Expunge from its files any reference to the discharge of James Connerly and notify him in writing that

[7] Though these acts of interrogation are not specifically alleged in the complaint as violations of the Act, I find them to be a mere extension of Respondent's action in promulgating and enforcing the disparate and unlawful no-solicitation rule. Moreover, they are specifically like and related to the complaint allegation regarding Respondent's interrogation of Connerly about alleged violations of the rule. Accordingly, there is a sufficient basis for finding that the interrogation of Garcia constitutes an additional violation of Sec. 8(a)(1) of the Act.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions against him.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Houston, Texas, facilities, including facilities located on East Little York and Igloo Streets, Copies of the attached notice marked "Appendix."[9] copies of the notice, on forms provided by the Regional Director for Region 23, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[9] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a trial at which all parties had the opportunity to present evidence and cross-examine witnesses, the National Labor Relations Board has found that we violated the National Labor Relations Act, and the Board has ordered us to post this notice and to comply with its provisions. We intend to abide by the following

WE WILL NOT promulgate or enforce a rule prohibiting employees from soliciting other employees to sign authorization cards or otherwise support a union on company time and WE WILL NOT apply such a rule selectively or disparately to stop employee union activity contrary to our longstanding practice of employees being permitted to engage in nonunion-related solicitations and distributions.

WE WILL NOT interrogate employees about alleged violations of the rule referred to above.

WE WILL NOT inform employees that if we learn they have been passing out union authorization cards on company time they will be immediately discharged.

WE WILL NOT solicit complaints and grievances from employees, thereby impliedly promising improved terms and conditions of employment, in order to discourage employees from further union activity.

WE WILL NOT threaten employees that we would close our doors before allowing employees to be represented by a union.

WE WILL NOT discharge employees pursuant to the rule referred to above because of those employees' union activities and in order to discourage employees from engaging in activity on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL offer James Connerly immediate and full reinstatement to his former position, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges.

WE WILL make whole James Connerly for any loss of earnings or benefits he may have suffered by reason of the discrimination against him by paying him a sum of money equal to the amount he normally would have earned from the date of his discharge to the date of the offer of reinstatement, with appropriate interest.

WE WILL expunge from our files any reference to the discharge of James Connerly and notify him in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions against him.

BLUEBONNET EXPRESS, INC.